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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONVERGEN ENERGY LLC, ET AL.,

Plaintiffs,

v.

STEVEN J. BROOKS, ET AL.,

Defendants.

20 CV 3746 (LJL)
TRO Telephone Conference

New York, N.Y.
May 19, 2020
4:04 p.m.

Before:

HON. LEWIS J. LIMAN,

District Judge

APPEARANCES VIA TELEPHONE

SEIDEN LAW GROUP, LLP
Attorneys for Plaintiffs

BY: MICHAEL STOLPER
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Theodore John Hansen and Brian R. Mikkelsen

BY: BENJAMIN LaFROMBOIS
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Attorneys for Defendants Steven J. Brooks, Gregory Merle,
Nianticvista Energy LLC and Riverview Energy Corporation.

BY: RYAN M. BILLINGS

K5JP CONO

1 (The Court and all parties appearing telephonically)

2 THE COURT: Good afternoon. This is Judge Liman. Who
3 do we have on the phone for the plaintiffs?

4 MR. STOLPER: Good afternoon, Judge. This is Michael
5 Stolper on behalf of the plaintiffs.

6 THE COURT: Good afternoon.

7 And who do we have -- I know there are a lot of people
8 on the phone. I really think I just need whoever is going to
9 be speaking. Who do we have on for defendants? Do we have
10 anybody for defendants?

11 MR. BILLINGS: Good afternoon, your Honor. This is
12 Ryan Billings from Kohner, Mann & Kailas, specially appearing
13 for Steven Brooks, Gregory Merle, Nianticvista Energy LLC and
14 Riverview Energy Corporation.

15 MR. LaFROMBOIS: This is attorney Ben LaFrombois for
16 Convergen Energy Wisconsin, Mr. Ted Hansen and Mr. Brian
17 Mikkelson.

18 THE COURT: Now, I heard one defense counsel say you
19 were specially appearing. Can you explain to me what that
20 means?

21 MR. BILLINGS: Certainly, your Honor. None of my
22 clients have been served, and we intend to contest jurisdiction
23 and venue. So I'm appearing solely to monitor that my clients'
24 rights are not violated without due process.

25 THE COURT REPORTER: I'm sorry, who was just speaking?

K5JPCONO

1 MR. BILLINGS: Sorry. That was Ryan Billings. I have
2 already violated your rule already. I apologize.

3 THE COURT REPORTER: Thank you.

4 THE COURT: So I have in front of me the plaintiff's
5 application for a TRO and a preliminary injunction. I'm
6 prepared to hear first from plaintiff's counsel, and then I'll
7 hear from defense counsel.

8 I would ask you, first, to speak slowly, and second,
9 to identify who you are. Assume that I have read the papers;
10 so I don't think I need you to go through in detail everything
11 that you are saying, just the high points.

12 For plaintiff's counsel, I might tell you that one of
13 the questions that I had goes to the reach of your proposed TRO
14 and whether you need anything other than what is in (a) and
15 maybe (e). But let me hear first from plaintiff's counsel, and
16 then I'll hear from defense counsel.

17 MR. STOLPER: Good afternoon, your Honor. This is
18 Michael Stolper on behalf of the plaintiffs, and we are
19 seeking, at the TRO stage, to cut off the defendant's access to
20 our electronic files, and I have the proposed order to show
21 cause up in front of me. And I think certainly (a) is what we
22 are looking for. I believe you had said -- was the other
23 letter that you had indicated was (e)?

24 THE COURT: (e) for expedite discovery.

25 MR. STOLPER: Okay. And I apologize because I notice

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1 there are two (e)s. But the first (e) with respect to
2 expedited discovery is certainly something we are looking for,
3 and also (d), where we're asking for equipment to be turned
4 over because it's our understanding that that equipment
5 contains our proprietary files.

6 And concerning -- in order to implement (a), we're
7 hoping to get (d), as we're referring to it. And we're also
8 looking for -- affirmatively, we are looking for administrator
9 access to the Convergen e-mails and to the e-mails for the
10 Convergen Latvia entity so that we can put an end to the cyber
11 attack and put those protections in place that we articulated
12 in our papers.

13 So I think that is what we were looking for at the TRO
14 stage. I think, as your Honor mentioned, you've read our
15 papers. The context of the application comes within a
16 fraudulent scheme that we've articulated in our complaint and
17 in our papers. And what we're looking for now is to cut off
18 access that the defendants never should have had, and in
19 particular, we're talking about the defendants that are on this
20 call.

21 The only defendants that are not on this call or not
22 represented on this call are those that are in Spain, and they
23 do have counsel that has responded to me. He's in New York,
24 but he is contesting jurisdiction. He was provided with notice
25 of today's call, but I take it that he's chosen not to

K5JP CONO

1 participate in this call.

2 But everyone else, all the other defendants and in
3 particular the ones that would be impacted by the relief that
4 we are seeking, are on this call, both directly as defendants
5 and also by counsel. And so that's what we are seeking at the
6 TRO stage.

7 I should say that we appreciate, on the plaintiffs'
8 side, the promptness and the availability of the Court today at
9 4:00 for something that we filed just this morning. And with
10 that, I'm open to any other questions you may have.

11 THE COURT: Yes. Let me ask you a question about the
12 proposed relief. You'll correct me if I'm wrong, but as I
13 understand (a), all that that would do, but it does seem to do
14 a lot, is it protects your electronic files and your
15 proprietary data or trade secrets from use by the defendants.
16 Is that right, it's limited to your electronic files and your
17 proprietary data and your trade secrets?

18 MR. STOLPER: Correct.

19 THE COURT: But if I go to (b) and (c), what is to
20 assure me that that account and that domain will not be
21 over-inclusive, and won't those materials include material that
22 either belongs to the defendants or is not a trade secret of
23 the plaintiff?

24 MR. STOLPER: That's a good question. Let me --
25 there's a very big distinction between (b), as in boy, and (c),

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1 as in Charlie.

2 Let me start with (b). That's easy. That's referring
3 to the Latvia entity, EuroenergyBiogas.com, that domain, and
4 the Office 365 account associated with that domain. That has
5 to do with Convergen Latvia's entity. That has nothing to do
6 with the defendant's business, the pellet plant in Wisconsin.

7 They should have never had access to that. They had
8 no basis for having access to that, and they don't have any of
9 their information, or shouldn't have any of their information,
10 intermingled with Latvia's Office 365 account and domain. So
11 there, there's absolutely no risk of their information coming
12 our way. That one is very straightforward and just sort of
13 highlights sort of the egregious nature of what's taken place
14 here.

15 (c), Romanette letter (c) in our proposed order to
16 show cause, C as in Charlie, that one, ConvergenEnergy.com,
17 that Office 365 account, as I understand it, contains
18 information both of the defendant, the Wisconsin pellet plant,
19 and those on the plaintiffs' side that have a
20 ConvergenEnergy.com e-mail. So there is some confluence there
21 under ConvergenEnergy.com.

22 So we had asked for -- prior to filing the suit, we
23 had asked for access to that account because we needed it for a
24 couple of reasons. One, to ward off the cyber attack and to
25 see what accounts are there and what's being accessed

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1 independent of the pellet plant personnel account, e-mail
2 accounts that are there, and that was denied.

3 So there, there needs to be some segregation. Now,
4 that's complicated but that complication is by their own doing.
5 We should never be in the position that we are in today. That
6 type of segregation should have been done prior to January 31,
7 2020. And the reason we're in this position, as articulated in
8 our papers, is because the very person and people who were
9 responsible for plaintiffs' side, for representing the seller
10 entity and protecting seller's assets that are now part of this
11 ConvergenEnergy.com Office 365 account, are the very people
12 that were double dealing and, in particular, Mr. Brooks; the
13 defendant, Steven Brooks.

14 And so I acknowledge that that account is probably
15 complicated, but as I indicated, that's a problem of their own
16 doing. And so we think that the Court should grant us that
17 access so that we can fix a problem that they've created, and
18 it's a problem that they've created in terms of their --

19 THE COURT: Let me interrupt you for a second, and let
20 me just treat these separately. Maybe you can tell me I
21 shouldn't treat them separately but they are both points with
22 respect to (c).

23 With respect to migrating the plaintiffs' e-mail and
24 data back to you and to your clients, why do you need that on
25 an emergency basis if I were to restrain the defendants from

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1 accessing that information or using it during the pendency of
2 the action?

3 MR. STOLPER: That's actually the point I was just
4 about to make. There's two sort of points of access that we
5 have articulated in our papers. One is access by the
6 defendants as the administrator, and if you're ordering them
7 not to access it, presumably if they follow your order, that
8 would address part of the concern.

9 The other part is that there is an unknown third-party
10 hacker who has conducted some type of cyber attack and may have
11 accessed Convergen Energy e-mail accounts that still belong to
12 us, still belong to plaintiff entities. We don't know, and so
13 we need access, and that's what the chief information officer
14 from our side had asked for prior to the suit, in order to just
15 see what's happened and put protections in the place to prevent
16 any further attack. And that's what we were rebuffed with.

17 So I think just telling the defendants not to access
18 this information, I don't know how practical that is, but it
19 still presents a problem from this unknown third party that's
20 presented a hack, and that's why we needed it. We're not
21 looking to probe, at this point, into their proprietary files
22 or their e-mails. You know, what we're trying to do is protect
23 our own at the TRO stage.

24 THE COURT: All right. Why don't you address (d) for
25 me. Are you asking for that at the TRO stage? It is, to me,

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1 rather aggressive.

2 MR. STOLPER: Well, this equipment -- it is
3 aggressive, your Honor, because it's mandatory. It's not
4 reactive. It's not asking them to maintain the status quo.
5 We're asking for mandatory relief, and I recognize that we're
6 doing it at the TRO stage, but the reason we're doing this is
7 they have no right to it. They are holding onto equipment that
8 belongs to us, that contains our files, that they should have
9 returned at the end of their employment, that they didn't. And
10 so they have no basis for holding onto it.

11 THE COURT: I'm going to hear from defense counsel in
12 a moment, but on the assumption that there are going to be some
13 disputed issues, why do you need that, again, at the TRO stage
14 rather than at a preliminary injunction stage? The purpose of
15 a TRO usually is to preserve the status quo, as I think about
16 it.

17 MR. STOLPER: It is to preserve the status quo, but
18 there is law that allows us to, you know, seek what they refer
19 to as some type of mandatory relief, an affirmative step, and
20 the is the one affirmative step, aside from the administrator
21 access that we were just talking about actually handing over.

22 They can hand it over to the Court. They don't need
23 to hand it over to us, but they have hardware that doesn't
24 belong to them that they could access and that we'd have to
25 trust them at their word that they're not deleting things on

K5JP CONO

1 there.

2 It's cell phones and laptops. I don't know
3 forensically how much we can recreate from a cell phone. I
4 know we can go pretty deeply on the laptop, if somebody
5 violated the order, violated an order and deleted files. But
6 these -- as I say, these are our assets that we own. They
7 should be turned over, taken away from the actors, from the bad
8 actors here.

9 And they've gone -- we've got in our complaint and
10 we've articulated in our papers, they took affirmative steps to
11 use cloak and dagger methods here. Mr. Brooks communicated
12 through a Gmail account, not through his corporate account.
13 They took steps in the electronic media front to hide and cover
14 up what they'd done.

15 It would be asking a lot for all of us to then trust
16 that today that they're not going to take -- continue to take
17 steps to try to cover up what they've done. It seems pretty
18 simple to hand over equipment that they have no business
19 holding onto, or any justification for having. And if there's
20 concern about turning it over to us, turn it over to the Court.

21 THE COURT: All right. Let me hear from defense
22 counsel, unless there's anything else you want me to know.

23 MR. STOLPER: No, no. That's good. Thank you, your
24 Honor.

25 MR. LaFROMBOIS: Thank you, your Honor. This is

K5JPCONO

1 attorney Ben LaFrombois. I want to make note that we are
2 appearing subject to jurisdictional objections. Depending on
3 the outcome of this hearing, that will be the next step, most
4 likely, that the Court would be hearing would be jurisdictional
5 matters regarding the case.

6 I would like to be responsive and concise. I'd like
7 to make just a few points to the Court. One, the data and
8 product, the assets that are being requested were transferred
9 to Convergen Wisconsin in the transaction that occurred
10 January 31, 2020. The transaction occurred arising from
11 negotiations and involvement of -- between Libra and Steve
12 Brooks and others.

13 Mr. Fidel Andueza is an employee, the chief investment
14 officer, of Libra, and plaintiffs' counsel referred to e-mail,
15 an e-mail account that was used. Well, the e-mail account was
16 used at the request of the employee of Libra, who was fully
17 aware of the structure of this transaction. And the fanciful
18 case of fraud is exactly that.

19 I want to point out to the Court that there really is
20 no emergency here, and the plaintiffs have failed to disclose
21 that there is an emergency. This transaction closed on
22 January 31. In the plaintiffs' complaint you will see that
23 they allege there that they became aware of this fraud the day
24 after, in contrast to the supporting documents submitted to the
25 Court today, where they say that they became aware sometime in

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1 April. I think we have a very significant factual discrepancy
2 within the plaintiffs' pleadings.

3 So back to the acquisition agreement. In that
4 acquisition agreement there's six pages that addresses the
5 transfer of intellectual property. Prior to the sale of -- the
6 transfer of the company and the sale of the assets, Libra had
7 unfettered and unrestricted access to this intellectual
8 property that now they would like to acquire today under
9 so-called emergency. And the true value to them is shown by
10 the fact that they didn't acquire it prior to the close of the
11 transaction.

12 So other events have arisen, and I think this whole
13 question of fraud is rather spurious. And as we litigate this
14 matter, the truth will come forward.

15 The Court should be aware also, you know, today's
16 motion was brought on four hours' notice. Similarly, a week
17 ago yesterday we received a demand from plaintiffs' counsel
18 explaining that if they didn't receive the remedy that is
19 sought in the complaint filed in Federal Court, that they would
20 file a state court claim.

21 Now, we responded by filing a declaratory judgment
22 action in the State of Wisconsin, Brown County, and we filed --
23 each of these cases were filed, I would imagine, within hours
24 of each other this past Thursday. And so then here we are,
25 probably essentially starting discovery, which because no

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1 emergency has been established, probably what they're looking
2 for, I would suggest to this Court.

3 To get into the (a) and (b), the questions the Court
4 is asking, we have two datasets. Interesting discussion on
5 what we call the Latvian e-mails or the Euroenergy Biogas
6 e-mails. We, at Convergen, have no desire to retain those. In
7 fact, some time ago we started the process to transfer them.

8 I'm not going to take time today to go through the
9 technical aspects of that, but we've been working with our
10 normal, third-party IT consultant to makes sure those e-mails
11 were and are transferred out. There was a delay -- I shouldn't
12 say a delay. The process required a new domain name to be
13 established. My understanding is that that has been and that
14 the migration is scheduled to take place in the next day or
15 two. And so with respect to that aspect of the data, we have
16 no desire to keep it and are willingly transferring it.

17 Certainly there is no need to bring a motion to
18 acquire that. My understanding is the communication has been
19 consistent as to how, what that process is going to be and how
20 it's running. And so from our point of view, that within a day
21 or two will be a moot point.

22 With respect to the broader set of data, this is the
23 data that was transferred at the sale January 31, and it
24 includes very sensitive --

25 THE COURT: Are you now talking about all of the data

K5JP CONO

1 that is in the ConvergenEnergy.com Office 365 account?

2 MR. LaFROMBOIS: Yes, sir.

3 THE COURT: Okay. Thank you.

4 MR. LaFROMBOIS: So there is, as anybody can imagine,
5 when you buy a company and substantially all of the assets of
6 the company, all of the intellectual property comes with it.
7 And inside the database of the e-mail is -- the e-mail and
8 attachments, are probably -- all of these most likely, nearly
9 all of the intellectual property of the company. That if
10 somebody acquired all of those e-mails, they certainly could be
11 a fierce competitor to Convergen Energy Wisconsin.

12 And that's the subject of the complaint that was filed
13 in Wisconsin. It's the subject of the complaint filed in the
14 Southern District of New York, and there is no emergency. So
15 we need to use the legal process in a reasonable way, not in a
16 way that says this is a fire that we need to put out. It's
17 really not. And we have an opportunity to have that litigated,
18 for the parties to determine their respective rights, and we're
19 looking forward to doing that.

20 With respect to this order, today what we request is
21 that the Court deny the temporary restraining order. They'll
22 get part of their remedy regardless because of the Latvian
23 e-mails being transferred in the very near future.

24 And then these issues, because they are complicated
25 and there's multiple agreements and we see factual

K5JPCONO

1 inconsistencies in the plaintiffs' pleadings, that we would
2 request two weeks to brief this issue and would hold and
3 request a hearing because there's a factual question whether
4 there's an emergency, and then there are factual questions of
5 what is the basis for their request.

6 THE COURT: Let me ask you a couple of questions. I
7 noticed that you did not address (a), and I do need to think
8 about balance of hardships. Is there any hardship to you with
9 respect to an order that you not access, disclose, copy or
10 convey plaintiffs' electronic files, or engage in activity that
11 uses plaintiffs' proprietary data or trade secrets?

12 I mean, there may ultimately be a fact issue down the
13 line as to what belongs to plaintiff and what doesn't. But are
14 you really going to suffer any hardship from an order that goes
15 to (a)?

16 MR. LaFROMBOIS: Yes, your Honor. Your Honor, I think
17 the issue with (a) is that it's a narrow -- to think about this
18 narrowly, we fully intend to retain the data as it is today.
19 I'm not saying today to suggest that there has been any
20 manipulation of the data. The dataset is what it is. The
21 company was bought. It continued to use the same system going
22 forward, and they would intend to do so.

23 But as far as purging or modifying or in any way
24 compromising the data so that an accurate picture of what has
25 occurred between all of the parties can be discovered and

K5JP CONO

1 discerned, we have no objection to that.

2 Getting into questions of use, of whose property is
3 what gets into a very complicated question. Maybe we
4 achieve -- I would suggest to the Court that we achieve what we
5 need to if we had a very narrow order or agreement that the
6 data would not be deleted, purged or modified outside the
7 normal course. Beyond --

8 THE COURT: Don't they also have a right to -- if it's
9 their data, aren't they entitled to know that your client's not
10 going to be disclosing it or using it, or engaging in activity
11 that uses it?

12 MR. LaFROMBOIS: Well, we certainly won't knowingly do
13 that. We wouldn't knowingly do that, but they're asserting
14 that they own data that we would assert that they do not. So
15 we get into a factual conundrum. If we're working with a
16 vendor and we need to disclose to that vendor certain
17 specifications that they claim is their data, but that's in the
18 normal course of business.

19 I think it would be an overbroad order at this point,
20 but we would -- hard to believe, in a temporary restraining
21 order, that we should be -- it would almost effectually cause
22 us to -- put a real chilling effect on our business.

23 And the data, from our point of view, should be just
24 retained so that it can, in the normal course and through the
25 judicial process, be discerned what is the truth here. I don't

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1 see an emergency. Even if they did have such an interest, what
2 is the emergency in requiring that order today? There's no
3 allegation that we have disclosed this to a third party
4 inappropriately or in any way. There's just no showing of
5 that.

6 THE COURT: What do you say about the risk of a cyber
7 attack on the entity?

8 MR. LaFROMBOIS: My understanding, your Honor, was
9 that there was a cyber attack to their Latvian organization.
10 In response to that, they quickly moved their e-mail accounts
11 to Convergen to protect them. So it's another element of the
12 story.

13 We've had an operating agreement where Convergen has
14 really been helping manage one of the Libra companies, and so
15 the e-mails they're requesting back, my understanding is
16 they're really brought over to Convergen to protect them. So
17 there's been a significant change of perspective on their part
18 in the better part of a month regarding whether they're safe or
19 not.

20 In today's digital trail, everything is going to be --
21 whatever they do is going to be discoverable. There's no
22 interest on our part to somehow use this data inappropriately.
23 So from our point of view, we, just a little over a month ago,
24 were used as a safe harbor for these e-mails. It's just taken
25 a month to get them transferred back out so that they can

K5JPCONO

1 respond.

2 I don't believe there's any allegation that the
3 setting of those e-mails at this point in time are at risk of
4 some type of cyber attack. And as I said, the e-mails are set
5 to be moved, migrated out to the new domain name as early as
6 tomorrow.

7 THE COURT: You made a suggestion about when we would
8 have a hearing, and I can't read my notes on that. What did
9 you say?

10 MR. LaFROMBOIS: Two weeks, your Honor.

11 THE COURT: Let me turn back to plaintiffs' counsel.
12 What is your evidence that there is a risk that
13 defendants will use or disclose your electronic files or your
14 proprietary data?

15 There is something to the defendants' point that
16 you've known that they've had this data for quite some time.

17 MR. STOLPER: Actually, no, your Honor. I'm glad you
18 raised that. I wanted to clear that up.

19 And for the court reporter, this is Michael Stolper on
20 behalf of the plaintiffs.

21 When counsel mentioned dates, I don't know if this was
22 intentionally -- if it was done intentionally to confuse you,
23 but our complaint made it clear that we found out about the
24 fraud around February 1, shortly after the closing on the
25 transaction. We didn't find out about the data breach until

K5JP CONO

1 mid to late April, when we started reaching out, and that was
2 in response to a cyber attack. So those two dates are two
3 different things.

4 So there could be absolutely no accusation that we sat
5 on our hands somehow and that there isn't an emergency. I
6 mean, it's pretty black letter law, especially in this circuit.
7 If somebody has access to somebody else's electronic files,
8 e-mails, data storage or otherwise, that's a problem. That's
9 an emergency. They have our data on their phones, on their
10 laptops, and they have access to it through this administrator
11 access.

12 So you asked me the question of what evidence do I
13 have? They used our data secretly to raise money to buy a
14 business secretly and covertly to double deal, you know, at a
15 price that's at least \$10 million less than what it's worth.
16 So they took our data already. That's what we've complained
17 about.

18 They took our data and they used it to, as part of
19 this fraudulent scheme, and then when we asked for the data
20 back -- data that when we raised the issue in April,
21 particularly with Latvia, because Latvia has nothing to do with
22 their business in Wisconsin. And when we asked for it back,
23 they didn't give it to us.

24 Now, they have no reason not to give it to us unless
25 there's something to hide, but in terms of what evidence we

K5JPCONO

1 have, it's all in the complaint; it's all in that affidavit
2 from Phaedra, our client, articulating all that they did as
3 part of disclosing our data to perpetuate their scheme.
4 They're continuing to do it.

5 And counsel indicated that this fraud claim is
6 spurious, but we have a recorded confession that we've quoted
7 in our complaint, and that's also referenced in our client
8 declaration, from Mr. Brooks, the man who orchestrated it.

9 And what counsel says to you, your Honor, part of
10 their defense is Libra knew, but the problem with that
11 statement is that Libra, here in this case, is in the form of
12 Mr. Brooks. That's the person who was trusted with carrying
13 this out on behalf of Libra, but it turns out he was
14 compromised, unbeknownst to everybody else at Libra.

15 So we do have an emergency. We do need relief today,
16 and I think that what we've articulated in (a) -- certainly
17 what counsel was doing was conflating (b) and (c), because (b)
18 is Latvia and (c) is Convergen.

19 THE COURT: So would you tell me what parts of the
20 declaration you want me to focus on in terms of when you
21 learned about the use and the risk of misuse?

22 MR. STOLPER: Sure. There is a -- are you asking for
23 a particular paragraph number?

24 THE COURT: Yes. I've now got the emergency
25 declaration of Phaedra -- I can't pronounce it.

K5JP CONO

1 MR. STOLPER: Chrousos. I may have said it wrong, but
2 she's not on the line to correct me. It is -- I'll give you
3 the exact paragraph number. I'm just scrolling through. Here,
4 it's on paragraph 9. It talks about when we found out about
5 the unlawful access that was triggered by the cyber attack.

6 And the fraudulent scheme, the disclosure of the
7 fraudulent scheme is articulated in the paragraphs that
8 preceded that. And it talks about finding out in paragraph 6,
9 7 and 8. But the scheme is laid out in greater detail in the
10 complaint.

11 This declaration was intended to articulate why we
12 needed this emergency relief, and that's really triggered by
13 what we learned in April, and that's starting at paragraph 9
14 under the heading, Cyber Tech Uncovered Defendants' Unlawful
15 Access.

16 THE COURT: Okay. Give me one moment, counsel --

17 MR. STOLPER: Sure.

18 THE COURT: -- to review this.

19 (Pause)

20 MR. BILLINGS: While you're doing that, your Honor,
21 this is Ryan Billings, I just want to note I'd like to be heard
22 on behalf of the defendants that I represent.

23 THE COURT: Okay. You will be. Just give me a
24 moment.

25 MR. BILLINGS: Thank you, your Honor.

K5JPCONO

1 (Pause)

2 THE COURT: So you'll have to correct me if I'm wrong
3 with respect to this, but the way that I read paragraphs 9
4 through 14 is that that's how you discovered that they had your
5 information. It doesn't contain evidence with respect to their
6 misuse of your information.

7 MR. STOLPER: The misuse of the information comes from
8 the complaint, where we talk about how they used our
9 information to conduct this fraudulent scheme, but in this
10 declaration, it also, in the subsequent paragraphs, where their
11 efforts -- where it talks about the efforts to deny access for
12 no reason, and then it talks about the failure to return
13 equipment even though the equipment was promised, that's in
14 the -- let me see here.

15 This was in paragraphs -- yes, in paragraphs 15 on
16 talks about all of the sort of obfuscating that was going on,
17 and then the equipment, the, yes, we'll turn over the equipment
18 and then not turning over the equipment, all that conduct --
19 you know, the inference from that conduct is there's a coverup
20 here and there's mal intent going on.

21 I mean, I don't have -- at least not yet, I don't have
22 an e-mail that shows that last week they sent our data off to
23 some third party or they're using it to price something to hurt
24 us. I wouldn't have that visibility, nor is that the burden or
25 the standard I'm up against. What we've articulated is a

K5JPCONO

1 fraudulent scheme that they did, in part, by using our data
2 that they shouldn't have had and by sharing it with third
3 parties, the Spanish investors, the prospective purchasers of
4 the business who ultimately purchased the business, that's
5 defendant Merle, Greg Merle who's represented on this call.

6 These are people who are all given insider access to
7 information based d on double-dealing executives, three of
8 them, and so that's what's articulated in the complaint and
9 referenced in summary fashion in this declaration.

10 And then in this declaration we talk about now that
11 they've been caught, how have they behaved in response to that?
12 And all of that paints a very, very negative picture of what
13 they've done, what they're trying to do. And the Latvian
14 e-mails are really the best example of that because counsel is
15 talking about transferring tomorrow, but in this declaration we
16 point out that they've been proposing this transfer. But why
17 the transfer? It isn't really giving us what we need. Those
18 are our files.

19 Transferring it to another domain cuts off the history
20 of those files and the electronic fingerprints associated with
21 those files. It's like they stole the car, but they want to
22 give me back the bumper. You know, they're not giving me back
23 my car, and so -- and they're saying, well, we're going to
24 transfer the wheels or we'll give you some parts. But I need
25 the whole car, and I need to look at where this car has been.

K5JPCONO

1 I need my car back, and that's not what they're giving us.

2 And they were proposing that through stall tactics
3 over the last couple of weeks, and in our declaration we point
4 out that that -- we explained to them why that wasn't
5 acceptable, but yet, to you, now that we've called them on it,
6 they're trying to put that up as somehow that that's
7 satisfactory but it's not.

8 THE COURT: Okay. Let me hear from Mr. Billings.

9 MR. BILLINGS: Thank you, your Honor. I don't want to
10 repeat anything that Mr. LaFrombois said, but I do want to make
11 four very quick points.

12 The first is that it is plaintiffs' burden on this
13 motion, under Rule 65(b)(1)(B), to set forth specific facts in
14 an affidavit that clearly show that immediate irreparable
15 injury will result before defendants can be heard. The only
16 evidence put forth before the Court is the declaration of Ms.
17 Chrousos.

18 Allegations in the complaint are just that. They are
19 not facts; so only the declaration is evidentiary. And it's
20 very clearly not based on personal knowledge. Ms. Chrousos
21 doesn't even infer that it's under personal knowledge. It's
22 littered with hearsay, double hearsay, speculation, conjecture,
23 conclusory statements. It provides no basis to establish that,
24 as a chief strategy officer, not an IT person, she has any
25 background to confidently testify as to the IT risk posed by

K5JP CONO

1 the status quo.

2 With respect to the records and who owns what, that is
3 set forth in the sale documents, which the plaintiffs have not
4 put before the Court. As Mr. LaFrombois said, there are six
5 pages in those documents that govern who owns what and that's
6 not before your Honor. They're asking for this relief without
7 putting forth the documents that establish the ownership
8 rights. So that's point No. 1. There is no specific evidence,
9 based on personal knowledge, that is competent before this
10 Court to establish irreparable injury.

11 The second point is that granting the order, in terms
12 of balancing the hardships, would cause irreparable harm to our
13 clients. The order to show cause is vastly overbroad, and I
14 think your Honor picked up on this. Gaining administrative
15 access to Convergen Wisconsin's Office 365 account would give
16 plaintiff control over all e-mails of Convergen Wisconsin,
17 including e-mails after the sale, such as privileged
18 communications between client and counsel about this lawsuit.
19 Obviously, that can't be turned over.

20 And just as plaintiffs allege that the e-mail
21 communications of Convergen Wisconsin prior to the sale involve
22 trade secrets and highly sensitive information, so too do the
23 communications after the sale. And the rights to these e-mails
24 are establishing contracts that plaintiffs did not provide to
25 the Court or describe.

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1 Another specific element to Mr. Brooks is that if you
2 look at what devices they're asking to be turned over, the
3 order is vague on that point. They say devices that have been
4 used in the course of employment. Does that mean ever? A
5 personal cell phone that took one call, does Mr. Brooks have to
6 turn over? Because in Ms. Chrousos' affidavit there's an
7 iPhone 11 mentioned, which is Mr. Brooks' personal phone. The
8 plaintiffs have no claim of right to that whatsoever.

9 The iPhone 8 that they describe is in Mr. Brooks'
10 New York apartment. He's in Connecticut sheltering in place.
11 He would have to travel to New York to pick up the phone and
12 breach quarantine. He lives with his elderly mother, who's an
13 at-risk person. There's no reason to do that.

14 The third point is that there are threshold
15 jurisdictional and venue issues here. There are many documents
16 associated with the sale. At least two of the documents
17 have -- agreements have mandatory arbitration clauses. At
18 least two of the agreements provide for exclusive jurisdiction
19 in Wisconsin, and in addition, there are questions of personal
20 jurisdiction and over two Spanish nationals and Spanish
21 entities who invested in the sale and whose rights would be
22 impacted by any TRO.

23 And lastly, the plaintiffs' motion papers don't
24 address the bond required under Federal Rule of Civil Procedure
25 65(c): No TRO or preliminary injunction can be granted unless

K5JPCONO

1 a security in an amount the Court considers proper to pay the
2 costs and damages sustained by any party found to have been
3 wrongfully enjoined or restrained is posted. Plaintiffs don't
4 address that at all.

5 And these are just the four points that came up in the
6 two hours since I represented -- been retained by two of my
7 clients. The overall point is this is incredibly complicated.
8 The parties are a mile apart on the facts, and the Court
9 deserves to hear from both sides fully in briefing before any
10 decision is made.

11 THE COURT: Thank you very much. I'm going to ask all
12 of the parties to hold on for a moment while I consider the
13 papers. It will give the court reporter a break, and I also
14 want to consult with my chambers staff. So why don't you all
15 hold for a moment.

16 (Pause)

17 THE COURT: Good afternoon again. This is Judge
18 Liman. So I've got a question for defense counsel, and then
19 I'll turn back to plaintiffs' counsel. It's with respect to
20 (b) of the TRO, with respect to the EuroenergyBiogas.com Office
21 365 accounts and domain.

22 Did you tell me that your client is in the process of
23 doing exactly what is requested in (b)?

24 MR. BILLINGS: This is Ryan Billings. That was a
25 statement by Mr. LaFrombois. I believe he might be on might

K5JPCONO

1 mute. But yes, it is in process and we understand it will be
2 completed in a day or two.

3 THE COURT: Okay. And --

4 MR. LaFROMBOIS: This is attorney Ben LaFrombois. I'm
5 sorry, if I may. I was talking. I had my phone on mute to be
6 respectful of the Court.

7 The answer is yes, as Ryan pointed out. I do believe
8 that, technically speaking, that was an allegation raised from
9 the plaintiff that these would not be the complete accounts and
10 the complete information on these accounts. My understanding
11 is that it would be. Now, that may be a technical question, if
12 the Court deems it appropriate to dig into that question. But
13 we have no interest in this data, and we would just as soon not
14 have it in our possession, and that is in the process of being
15 transferred as early as tomorrow.

16 THE COURT: Let me turn back to the plaintiff. Is it,
17 in fact, consistent with your understanding?

18 MR. STOLPER: No, your Honor. At paragraph 18 of the
19 Chrousos declaration, the one I was referring to earlier, and
20 it enumerates why this proposed transfer is insufficient, and
21 that's why we included that in our application. If it were
22 sufficient and it were fine, we wouldn't have an issue with it.

23 We have plenty to -- we have plenty in our complaint.
24 We don't need to add allegations and claims if unnecessary, but
25 in this instance, what they're proposing was unsatisfactory to

K5JPCONO

1 my clients, to their IT personnel, who are certainly more
2 well-versed than I am in the technicalities of what they were
3 proposing, which is why she wrote what she wrote here in this
4 statement.

5 THE COURT: And let me tell you what --

6 MR. LaFROMBOIS: This is attorney Ben LaFrombois. May
7 I respond, your Honor?

8 THE COURT: Yes.

9 MR. LaFROMBOIS: The issue of why these accounts need
10 to be moved into a separate domain is because within the
11 Convergen Energy account, we kind of distinguish between
12 administrator rights for the Latvian accounts and administrator
13 rights for all of the other Convergen accounts.

14 So to give access to the Latvian accounts means you
15 have access to all of the intellectual property whose ownership
16 is in dispute here; so those two can't be divided. The way to
17 divide it is to take the new domain name, which has been
18 created, and transfer those Latvian accounts out.

19 So to give administrator rights for the Latvian
20 accounts is just the back door -- actually, it's the front door
21 to all the other e-mail accounts that are in dispute.

22 THE COURT: Okay. I think I understand the
23 disagreement between the parties. Let me tell you what I'd
24 like to do, and my hope is that the defendants will consent to
25 this because it's only going to be short term, for two weeks.

K5JP CONO

1 But it seems to me, without addressing everything in
2 the order to show cause, that with respect to (a), the
3 plaintiffs are entitled to that, and the defendants are not
4 going to suffer any prejudice from that. There will be a time
5 period for sorting out what actually is plaintiffs' and what
6 actually is defendants'.

7 If the defendants were to knowingly access and use or
8 disclose plaintiffs' electronic files, that would be wrong, and
9 the plaintiffs are entitled to an order of the Court with
10 respect to (a).

11 With respect to (b), these are complicated issues, and
12 it seems to me that the right answer is that for the two-week
13 period of the TRO, that the order that I should enter, it's not
14 quite what the plaintiffs want me to do or what the defendants
15 want me to do. It would be an order that would prevent the
16 defendants from accessing, disclosing, copying or otherwise
17 using, destroying or impairing any of the data in the
18 EuroenergyBiogas.com Office 365 accounts or in the
19 EuroenergyBiogas.com domain, or in any way preventing the
20 plaintiffs from ultimately being able to acquire the administer
21 rights.

22 So in other words, what I'm asking for is a standstill
23 with respect to (b), but that if it is determined ultimately,
24 at a preliminary injunction hearing, that the plaintiffs are
25 entitled that it's requested in (b), that can be given. If

K5JPCONO

1 they're not entitled to it, the defendants will not be any the
2 worse off because the defendants have said they don't want any
3 of that data and that information.

4 With respect to (c), I would just enter an order that
5 would restrain the defendants, in any way, from destroying,
6 deleting, altering, or making any changes to any of the
7 historical e-mails, data, audit logs, or any other data or
8 e-mails that belong to the plaintiffs, and that would restrain
9 the plaintiffs from viewing the e-mails and data, period,
10 period. In other words, the defendants can't destroy, delete
11 or the like any of the data that belongs to the plaintiffs on
12 the Office 365 account.

13 With respect to (d), the defendants would be ordered
14 to retain all of the computer, cells phones and other hardware
15 utilized during their employment with respective plaintiff
16 entities, and not to delete or destroy or alter any of the data
17 that belongs to plaintiff on those computers, cell phones and
18 hardware.

19 With respect to (e), it seems to me that it does make
20 sense for there to be expedited discovery and for us to have a
21 hearing in two weeks' time, if that's what the parties want. I
22 can set aside time two weeks from today, or you might decide
23 that you can live with this restraining order for a little bit
24 longer and you want a little bit more time to do discovery.
25 What I would ask is for the parties to meet and confer with

K5JPCONO

1 respect to how much time they need, if they need time, more
2 time beyond the two weeks. Period, that's it.

3 Let me address defendants. Why shouldn't I enter an
4 order to that effect, and are you comfortable with it,
5 recognizing you don't want it, you don't want any order?

6 MR. LaFROMBOIS: Your Honor, I would -- recognizing
7 that we would not want any order, to be clear, with respect to
8 (b), that my understanding is the EuroenergyBiogas.com account
9 is now established, that your order would permit us to provide
10 the administrator rights to that account and not retain any
11 rights to it, if that would be permitted?

12 THE COURT: I think with respect to that -- and it's
13 useful clarification -- you can provide the administrator
14 rights with the consent of the plaintiffs. So if all of you
15 agree that what you are providing is what the plaintiffs want,
16 just having the effect of eliminating a trail of information,
17 or giving the plaintiffs the hubcaps and not the car, to use
18 the plaintiffs' analogy, and plaintiffs object, then you're not
19 going to do that. You're just going to have a standstill and
20 we can sort it all out in two weeks.

21 MR. LaFROMBOIS: Other than that clarification, your
22 Honor, that was the clarification that I was seeking as I was
23 listening to your proposed order.

24 THE COURT: Okay. Let me turn to Mr. Billings. Do
25 you have something to say? Then I'm going to turn to

K5JP CONO

1 plaintiffs' counsel.

2 MR. BILLINGS: Thank you, your Honor. And, you know,
3 I think that everybody, plaintiffs and defendants, have been
4 under a preservation obligation since they reasonably
5 anticipated suit. So I'm not certain that we necessarily need
6 an injunction to establish that; it attaches by operation of
7 law.

8 My only concern is that there's a disagreement on (a)
9 between the parties as to what belongs to the plaintiffs and
10 what doesn't. And for instance, let's say that to continue to
11 operate the business they bought, one, a party needs to look at
12 an e-mail from January 30th of 2020 or a contract signed on
13 January 4th of 2020, I don't want to suddenly run afoul of the
14 Court order in the course of normal operations of the business.
15 That's the only ambiguity I'm concerned about.

16 Otherwise, being in the same position as Mr.
17 LaFrombois, I don't want any order, but I guess I can live with
18 one along those lines.

19 THE COURT: Well, listen, with respect to that, I
20 understand there may be disagreements on the margin, and if
21 there's a disagreement in the margin and it can't wait two
22 weeks to bring it to the Court, you're going to bring it to the
23 Court earlier, or else you'll proceed at your own peril.

24 Let me turn to plaintiffs' counsel.

25 MR. STOLPER: Thank you, your Honor. This is Michael

K5JPCONO

1 Stolper on behalf of the plaintiffs and I, as the recipient of
2 your proposed order, I'm appreciative of it. And I have only
3 two comments or two concerns with two pieces of it.

4 One has to do with audit logs that are referenced in
5 the order, in our proposed order to showcase, and also in the
6 declaration. My understanding is that audit logs are sort of
7 the electronic fingerprints of what's transpired with respect
8 to an Office 365 account, and they have -- audit logs are
9 maintained for a set period of time, and there's usually a
10 default period of time for those things to remain in place.

11 What we would ask for is that the audit logs -- and
12 they control the administrator rights, you need the
13 administrator rights to modify the period in which the audit
14 logs are maintained. We'd like, as part of your order, to
15 instruct the defendants that are in control of the
16 administrator rights of the various accounts that are in issue,
17 that they extend the audit logs for as long as possible under
18 the Office 365 platform. That was one issue, your Honor.

19 The second is my concern about the cyber attacks. So
20 if we put everything on hold for two weeks with respect to the
21 Latvia account, my understanding is that transferring what the
22 defendants had proposed about creating this new domain and
23 giving us administrator rights to this new account, to which
24 our old files would be transferred, my understanding is that
25 that will not forestall or protect us against cyber attacks and

K5JPCONO

1 now if we're talking about a two-week period.

2 So I think we have exposure under what's being
3 proposed. Even if we were to consent to it offline with
4 counsel, and they said, over the next two weeks, why don't we
5 just do this transfer and to the extent you have issues, we'll
6 deal with it in two weeks at a hearing, that would be fine
7 except I think that also leaves us exposed to cyber attack,
8 which is some of the relief that we're seeking.

9 I have no problem if -- if the only objection that is
10 heard is -- because this is Latvia. This has nothing to do
11 with the Wisconsin plant. If the issue is that access to
12 Latvia somehow gives, whomever is given access to Latvia, some
13 visibility into the defendant's files on a going concern, then
14 we have no problem putting it in the hands of a third party,
15 you know, computer consultant to execute what's instructed. In
16 other words, to put whatever protections are in place, do
17 whatever transfers of our data and our files, you know, have a
18 third party do it so that we don't have visibility into what
19 they're concerned about. But let's not lose sight of the fact
20 that for Latvia, these are our files, our assets, and they have
21 no rights to them.

22 THE COURT: With respect to the second point, it very
23 well may make sense for two of you, after this conference is
24 over and in the next couple of days, to have a conversation
25 about whether there is a way to accommodate your respective

K5JPCONO

1 interests. And I'm sure that the defendants don't have a
2 desire to be in possession of information that may be the
3 subject of a cyber attack for which they might have liability
4 if they permit the cyber attack and that is of no value to
5 them.

6 So I don't think today I can sort out the technical
7 issues that you've raised. In fact, I know I can't. I might
8 be able to and will sort them out in two weeks' time, if I have
9 to, but you may be better off if you are able to work that out
10 yourselves.

11 With respect to the audit logs, from the defendants'
12 perspective, I would think that you would have to do something
13 like that anyway in terms of document preservation. So any
14 objection to that being part of the order?

15 MR. LaFROMBOIS: Your Honor, we think that there's
16 good reason to meet and confer on these technical issues, and
17 there is a third-party consultant that's addressing this matter
18 for us. So I think it would helpful to have that meeting to
19 confer with counsel on the technical issues. This is attorney
20 Ben LaFrombois.

21 THE COURT: For defense counsel, do you have an
22 objection to including in the order that you will instruct the
23 administrator to extend the audit logs for as far as possible
24 so as to retain the record of activity within the accounts?

25 MR. LaFROMBOIS: We have no objection to giving that

K5JPCONO

1 instruction to our consultant.

2 THE COURT: All right. So, listen, I'm going to talk
3 about scheduling in a moment, but we are going to enter a
4 revised TRO that will attempt to capture what I have just laid
5 out. What I may ask the two of you to do is to meet and confer
6 and see if it is clear and if you would suggest any revisions,
7 but you have the gist of my thinking and you'll have it in the
8 TRO that I'm going to issue. The TRO will be effective, but
9 I'll also entertain an application to revise it to make it
10 clearer.

11 With respect to, did you all want a hearing in two
12 weeks' time?

13 MR. STOLPER: Yes, your Honor. This is Michael
14 Stolper on behalf of the plaintiffs. The answer would be yes.

15 THE COURT: That is June 2nd, and I'm just looking at
16 my calendar. We can do it June 2nd at 2:00 p.m. It will be
17 done remotely, either telephonically or with video, and I'm not
18 sure yet. I'll entertain suggestions by the parties as to how
19 they want to do it, and I'm also going to permit expedited
20 discovery.

21 With respect to briefing on the application for the
22 preliminary injunction, I would like it to be completed by
23 May 29th. Then I've got the weekend with the papers. Why
24 don't you meet and confer with respect to a schedule for papers
25 on a preliminary injunction. If you're not able to come up

K5JP CONO

1 with a joint proposal, you can each make separate proposals. I
2 think for some order around this, why don't you make the
3 proposals by Thursday at 5:00 p.m.

4 MR. STOLPER: That sounds like a reasonable plan, your
5 Honor.

6 In terms of a schedule -- this is Michael Stolper on
7 behalf of the plaintiffs. I just wanted to mention, your
8 Honor, that I welcome the meet-and-confer concept to try to
9 work through some of these technical issues. What I just want
10 to do, the Court's been gracious with it's time so far and its
11 availability. I don't want to offend the Court's sensibility.

12 If, for some reason, that we're unable to, and I don't
13 want to jinx us, but if we are unable to work through the
14 concerns I have about a cyber attack, pending our June 2nd
15 conference, I just want the ability to come back to the Court
16 if we do need some type of relief that we couldn't work out on
17 our own prior to June 2nd.

18 THE COURT: That's okay.

19 MR. STOLPER: Thank you, your Honor.

20 THE COURT: You've got that permission.

21 MR. STOLPER: Thank you.

22 THE COURT: Anything else from defense counsel?

23 MR. BILLINGS: Your Honor, this is Ryan Billings. My
24 only, I guess, caveat is that none of my clients have been
25 served yet, and so we're not even in this lawsuit. So we will

K5JPCONO

1 do our best to incorporate ourselves into this plan, but it's
2 going to be a little bit complicated for us; so we'd appreciate
3 your Honor's patience in sorting out that issue.

4 MR. STOLPER: I thought you had waived service, Ryan,
5 and you were just looking for a waiver form from us. Are you
6 withdrawing that? Because I thought you said you did want
7 service. We had process served everyone else, but you had said
8 in your e-mail to me, you said that you were agreeing to a
9 waiver, that we didn't have to deal with process servers, and
10 so we pulled back the process server from serving your client
11 based on that e-mail. Are you changing your position?

12 MR. BILLINGS: My position was and remains that I will
13 sign an FRCP4(d) waiver, if you send it to me, and then we'll
14 go from there.

15 MR. STOLPER: That's what we'll do.

16 MR. BILLINGS: Thank you.

17 THE COURT: Okay. Good. Listen, if there are good
18 objections to my jurisdiction, I am sure I will hear that from
19 the parties.

20 MR. BILLINGS: Thank you, your Honor.

21 THE COURT: All right. Thank you, everybody.

22 Thank you to the court reporter.

23 Let me ask, before we all get off the phone, since
24 this is the plaintiffs' application, for the plaintiff to order
25 a copy of this transcript on an expedited basis, and if you've

K5JPCONO

1 got questions about how to do that, you can stay on with the
2 court reporter after I hang up from this call.

3 MR. STOLPER: Thank you, your Honor. Will do.

4 THE COURT: Thank you, all.

5 (Adjourned)
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